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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-[illegible]

STOCKMEN'S INSURANCE AGENCY, INC.,
Petitioner,

vs.

GUARANTEE RESERVE LIFE INSURANCE COMPANY OF HAMMOND, INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner's recitation of the opinion below is incomplete. The first opinion of the North Dakota Supreme Court was filed February 13, 1974. Petitioner, after receiving an extension of time from the Court, filed a petition for rehearing on March 8, 1974. By minute order entered on April 25, 1974, the North Dakota Supreme Court amended its opinion, denied the pending petition for rehearing and granted petitioner fourteen days in which to file a petition for rehearing as to the amended opinion. Petitioner filed a second petition for rehearing on May 8, 1974. On May 16, 1974, the Court denied the second petition for rehearing. The amended opinion is officially reported at 217 N.W.2d 455 (N.D. 1974) and is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent denies that petitioner seasonably raised a federal question in the Court below and therefore respectfully submits that petitioner cannot properly invoke the jurisdiction of this Court. The petition for Writ of Certiorari wholly fails to establish that ". . . any title, right, privilege or immunity [was] specially set up or claimed under the Constitution . . . of . . . the United States" within the meaning of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents eight questions for review by this Court. All eight questions relate to the internal procedures followed by the Court below in reviewing decisions of a trial court. Each of the eight questions was raised for the first time upon petition for rehearing to the North Dakota Supreme Court. Respondent urges that the asserted eight questions are not properly presented for review to this Court, as they have no support in the record, were not timely raised below, and are frivolous on their face, contrived in order to attempt to invoke the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The record discloses that no constitutional provisions were involved or relied upon by either petitioner or respondent, from the original pleadings through the oral arguments presented to the North Dakota Supreme Court.

STATEMENT OF THE CASE

The questions presented for review to this Court by petitioner do not spring from the facts of this case. Petitioner has chosen wholly to ignore the nature of this case and how the factual issues and questions of law were dealt with by the Court below. Thus a statement of the case below will shed no light on petitioner's questions presented for review, but it will serve to persuasively demonstrate the absolute and total absence of a federal question in this case. The following statement of facts portrays a classic case that involves solely questions of state law and does not even raise an inference of constitutional import.

STATEMENT OF FACTS

On May 14, 1959, Stockmen's Insurance Agency, Inc. [hereinafter referred to as "Agency, Inc."] was incorporated for the stated purpose of carrying on through subsidiary corporations a health, accident and life insurance business in the State of North Dakota. The original plan of Agency, Inc. was to form a stock company authorized to write all kinds of life, health and accident insurance. This company was to be financed by proceeds from the sale of stock by Agency, Inc. The immediate objective was to raise $275,000.00 for this purpose. Stock sales were, however, much slower than anticipated, netting only $72,563.88 in cash and time sales through April 13, 1960. It then appearing that it would take an indefinite period of time to raise the necessary capital to secure a license for such a stock company, an alternative plan was devised to form a mutual company requiring only a $50,000.00 capital outlay.

The alternative plan was approved by stockholders of Agency, Inc., and a subsidiary corporation with interlocking officers and board of directors was formed. This subsidiary, named Stockmen's Health Mutual Co. [hereinafter referred to as "the Mutual Co."] was assured, on May 10, 1960, of a capital advance of $50,000.00 from Agency, Inc. in order that the Mutual Co. might commence business. Agency, Inc. then made public offerings of common stock and issued various prospectuses. Agency, Inc. was to derive its income from a management fee equal to ten per cent of gross premiums, as set forth in a *proposed* written management agreement to be entered into between Agency, Inc. and the Mutual Co., to run for a period of twenty years commencing June 9, 1960. This proposed written management agreement was, however, never executed by either of the parties. On June 7, 1960, the Mutual Co. commenced selling insurance policies through various general and writing agents.

These writing and general agents were employed by the Mutual Co. and its successor, Reserve Life, under alleged oral contracts whereby general agents were to receive a fifteen per cent renewal commission on all business sold through the general agency, a five per cent overwrite commission to go to the general agent and a ten per cent commission to the writing agent. Whether such express oral agency contracts ever existed and, if so, who were the parties to such contracts and what were the terms thereof, were all matters of dispute in this action. It was not in dispute, however, that written agency contracts were offered to various agents, but on all occasions were refused and were never executed.

On November 15, 1961, Agency, Inc. took action to absorb Dakota Protective Life, and on December 12, 1961, required all directors to execute notes equaling $55,000.00.

This takeover of Dakota Life, together with the notes, increased the assets of Agency, Inc. enough so that the original plan of a stock company could be effected. On December 13, 1961, a charter was obtained forming Stockmen's Reserve Life Insurance Company [hereinafter referred to as "Reserve Life"]. A merger was subsequently consummated leaving Reserve Life as the surviving company.

By July, 1963, Reserve Life was in serious financial difficulties. The North Dakota Insurance Commissioner was about to use $200,000.00, the required policy reserve on deposit by Reserve Life, to pay policy claims which were then in arrears to the extent of $180,000.00 to $200,000.00. Unless additional capital were immediately made available, the Commissioner indicated he would have issued an order stopping sales, and would have then followed the statutory proceedings for an insolvent insurance company.

It was at this point in time that the defendant-respondent, Guarantee Reserve Life Insurance Company of Hammond, Indiana [hereinafter referred to as "Guarantee Reserve"] first entered the picture. Guarantee Reserve proposed to reinsure and assume the policy obligations of Reserve Life. The proposed Contract of Reinsurance and Assumption was first presented at a special meeting of the board of directors of Agency, Inc. on July 27, 1963. It was subsequently approved and ratified by the stockholders of Agency, Inc. on August 26, 1963, and by the stockholders of Reserve Life on the same day. The Contract of Reinsurance and Assumption was executed by the respective parties, apparently on July 27, 1963, but did not become effective until approved by the Insurance Commissioners of both North Dakota and Indiana, on August 28, 1963. The contract was executed by Larry Davis as presi-

dent of Reserve Life and Jerome Kutak as president of Guarantee Reserve.

Under the terms of the assumption agreement, Guarantee Reserve assumed no liability, debt or obligation of Reserve Life other than policy liabilities and agents' commissions as provided for in existing written contracts. At meetings in the North Dakota Insurance Commissioner's office contemporaneous with the negotiations preceding execution of the assumption agreement, the Commissioner inquired of Guarantee Reserve regarding its position on payment of agents' renewal commissions on business written for the Mutual Co. and Reserve Life. Guarantee Reserve responded to the request by letter dated August 19, 1963, received in the Commissioner's office August 27, 1963. In view of its importance, that letter is set forth in its entirety below:

"August 19, 1963

Honorable Frank Albers
Commissioner of Insurance
State Capitol Building
Bismarck, North Dakota

Dear Sir:

In keeping with your request regarding the payment of commissions to agents of Stockmen's Reserve Life Insurance Company within a contract dated July 28, 1963, I have discussed the commissions with Mr. Davis, President of Stockmen's Reserve Life Insurance Company, and found that there are no written agreements between Stockmen's Health Mutual and Stockmen's Reserve Life and its agents and/or general agents.

It is our understanding that the writing agents have been paid 10 per cent and the general agents 5 per cent. This commission was to be paid so long as

these agents devoted 100 per cent of their time to the development of these two companies.

Guarantee Reserve Life Insurance Company of Hammond will agree to continue the payment of commissions to presently active writing agents and to their general agents—writing agents have a commission of 10 per cent and general agents an overwrite of 5 per cent, with no recapture of commissions permitted to the general agent; so long as these agents and/or general agents are licensed by and contracted to Guarantee Reserve Life and devote all of their time and energy to the business of Guarantee Reserve Life in the service of the business that they have written and in the production of a satisfactory amount of new business.

Sincerely yours,

Guarantee Reserve Life Ins. Co.
/s/ Ira Lipshutz
Ira Lipshutz

IL:lhg"

After Guarantee Reserve reinsured the policies of Reserve Life, 25 of 284 general and writing agents, who at one time were employed by the Mutual Co. and its successor Reserve Life signed written agency contracts with Guarantee Reserve. The remaining agents, for reasons not known, chose not to accept employment with Guarantee Reserve. With the exception of one, all those 25 agents have since been properly terminated by Guarantee Reserve, pursuant to the terms of their written agency contracts. Those 25 agents, while employed by Guarantee Reserve, were paid their renewal commissions on Reserve Life business pursuant to the commitment of Guarantee Reserve contained in the letter of August 19, 1963.

On May 9, 1965, Agency, Inc. commenced an action in Burleigh County District Court seeking recovery of a management fee allegedly owed by Reserve Life to Agency, Inc. and allegedly assumed by Guarantee Reserve under the Contract of Reinsurance and Assumption. The following year, while this action lay dormant, Agency, Inc. sold all of its assets of whatsoever kind to United Reserve Underwriter's, Inc., a Colorado corporation. Four years later, on August 6, 1970, Agency, Inc. amended its complaint in the original action commenced in 1965, alleging for the first time a right to recover renewal commissions allegedly owed by the defendant, Guarantee Reserve, to the 259 agents who chose not to accept employment with Guarantee Reserve and to those 25 agents who accepted employment with Guarantee Reserve, for the period following their termination.

The action was tried to the Burleigh County District Court, without a jury, in February, 1971. In an oral decision rendered from the bench the trial judge ruled in favor of Guarantee Reserve on Agency, Inc.'s claim for a management fee and in favor of Agency, Inc. on its claim to recover renewal commissions.

Guarantee Reserve appealed from that part of the judgment awarding Agency, Inc. renewal commissions. Agency, Inc. cross-appealed from that part of the judgment denying Agency, Inc. its claimed management fee. Both appeals followed extensive post-trial motions and one appearance before the North Dakota Supreme Court on various procedural motions. However, none of these procedural issues arising prior to the North Dakota Supreme Court's decision on the merits is raised in petitioner's questions presented for review.

After receipt of the record and briefs on the appeal of Guarantee Reserve and cross-appeal of Agency, Inc.

the case was placed on the calendar for the June, 1972, term of the North Dakota Supreme Court. Oral arguments were set for June 9, 1972. Agency, Inc., petitioner herein, was allowed one hour in which to present its case; Guarantee Reserve, respondent herein, was allowed one and one-half hours. Oral arguments were presented to the entire Court, consisting of five judges. Four of the five judges were regular judges of the North Dakota Supreme Court, while the fifth judge was a district judge called upon pursuant to the provisions of Section 100 of the North Dakota Constitution. The district judge sat on the case in place of the Chief Justice who, as a policyholder of Guarantee Reserve, disqualified himself. At the time oral arguments were presented to the North Dakota Supreme Court no objection was made by petitioner regarding the qualifications of the district judge or the manner in which he was called upon to sit as a judge of the Supreme Court.

On February 13, 1974, the North Dakota Supreme Court rendered its decision affirming in part and reversing in part the judgment of the district court. The decision affirmed the district court's denial of the management fee claimed by Agency, Inc. and reversed the district court's award of renewal commissions to Agency, Inc. After receiving an extension of time in which to petition for rehearing, Agency, Inc., on March 7, 1974, filed a Petition for Rehearing in the North Dakota Supreme Court, reciting six issues for consideration. Only one of the issues (the sixth) asserted a constitutional violation. The issue as stated was that "[t]he appellate procedure was unconstitutional". In support of this asserted constitutional violation, Agency, Inc. submitted to the North Dakota Supreme Court the identical argument, verbatim, that is set forth under the heading "Constitutional Questions" in the Petition for Writ of Certiorari.

On April 25, 1974, the North Dakota Supreme Court entered an amended opinion and denied the Petition for Rehearing without comment. The amendments to the original opinion are not material to the questions presented for review in the Petition for Writ of Certiorari. After amending its original opinion, however, the Court allowed Agency, Inc. the opportunity to file a petition for rehearing as to the amended opinion. Agency, Inc. filed a second petition for rehearing on May 8, 1974, which was denied by the Court without comment on May 16, 1974. The second petition raised no constitutional questions except in passing in the conclusion. Without specifying what provisions of the state constitution were violated the petitioner asserted the North Dakota Supreme Court failed ". . . to issue a written opinion on every question raised", kept ". . . secret the rules under which it. . ." operated and called upon a district judge to sit on the Court in violation of the state constitution. Petitioner sought a rehearing before what petitioner characterized as a "properly constituted panel" of the Court.

None of the numerous specifications of error and specifications of insufficiency of the evidence alleged in the appeal of Guarantee Reserve and cross-appeal of Agency, Inc., ever purported to raise a federal question. Petitioner, as it must, concedes that no federal question was urged on argument of the appeals before the North Dakota Supreme Court. Petitioner's purported federal questions were first raised in the first petition for rehearing after a decision had been rendered by the Supreme Court adverse to petitioner. Thus petitioner's first attempt to create a federal question was a rather confused and contrived assault upon the makeup of the North Dakota Supreme Court panel urged some twenty-one months after petitioner had presented extensive oral argument on appeals to that Court.

ARGUMENT

Petitioner asserts eight questions presented for review. Under the heading "Time and Manner of Raising Constitutional Questions" at page 5 of the Petition, it is conceded that none of the purported federal questions were raised until the first petition for rehearing directed to the North Dakota Supreme Court. Petitioner's purported federal questions are set forth below verbatim, with argument following, in the order they appear in the petition.

1. **"Can an appellate judge, admittedly too prejudiced to sit himself, select his substitute who he knows under the court's unwritten code will be assigned the case and will be the only judge to review the record and determine the facts for all the other judges?"**

The first question is replete with assumed facts that are patently false and not supported by a shred of evidence in the record. The Chief Justice deeming himself disqualified as a policyholder of the respondent withdrew from the case. In such instances the North Dakota Constitution provides:

> "Section 100. In case a judge of the supreme court shall be in any way interested in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause."

Pursuant to this constitutional provision, District Judge Douglas B. Heen was called upon and sat in place of the Chief Justice. Petitioner assumes in his question that the Chief Justice chose his replacement. The record pro-

vides no support for such an assumption. Yet even if it had been so, such an act was ministerial in nature and obviously received the ratification of the remaining judges when the court convened with Judge Heen at the bench.

Petitioner's assertion that there exists an "unwritten code" among the members of the Court that a substitute district judge will be assigned the case is at best a bizarre figment of counsel's rather vivid imagination. One has only to examine the volumes of the reported decisions to find numerous examples where the Court's opinion was written not by the designated district judge sitting on the panel but rather by one of the regular Supreme Court judges. For example: *Richland County* v. *State,* 180 N.W.2d 649 (N.D. 1970) (opinion by Judge Strutz, District Judge Giese sitting in place of Judge Paulson); *Loeb* v. *Landon* and *Mahrer* v. *Landon,* 214 N.W.2d 503 (N.D. 1973) (opinion by Judge Teigen, District Judge Beede sitting in place of Judge Vogel); *Heid* v. *Shafer,* 140 N.W. 2d 584 (N.D. 1966) (opinion by Judge Strutz, District Judge Kelsch sitting in place of Judge Burke); *McNaught* v. *MacArthur,* 209 N.W.2d 639 (N.D. 1973) (opinion by Judge Teigen, District Judge Giese sitting in place of Judge Erickstad); *Perdue* v. *Knudson,* 179 N.W.2d 416 (N.D. 1970) (opinion by Judge Strutz, District Judge Jansonius sitting in place of Judge Knudson).

Even if such an informal rule were in effect, what constitutional right of petitioner would be violated? The opinion stating the decision and the reasoning of the Court is not simply the opinion of the single judge whose name appears at the head of the opinion. It is the opinion *of the Court,* adopted by the Court in the case of a unanimous decision, as in the instant case, or by a majority of the judges, unless special concurring opinions are written, in the case of a split decision. The opinion in the

instant case was signed by all five judges sitting on the panel for the case and thereby became the unanimous opinion of those judges and of the Court.[1]

Petitioner's final assumption that a substitute district judge ". . . will be the only judge to review the record and determine the facts for all the other judges" is wholly unsupported by the record. Furthermore, the assertion, frivolous on its face, is a gross insult to the North Dakota Supreme Court unbecoming for a member of the bar. The opinion was written by the district judge, sitting here as a judge of the Supreme Court by designation, but the unanimous decision was the decision of the entire Court after presentation of extensive briefs and oral arguments to the entire Court. Obviously the record does not and cannot reflect the procedures followed by the five judges in their decision-making process. To open up the private chambers of appellate judges to scrutiny by counsel or the public would effectively destroy the independence and objectivity of the appellate judicial process. The confidentiality of the decision-making process of our courts must remain sacrosanct if appellate review is to remain a viable part of the judicial system.

Once a decision is reached it necessarily becomes a matter of public record. The decision when rendered must conform to the following sections of the North Dakota Constitution:

> "Section 101. When a judgment or decree is reversed or confirmed by the supreme court every point fairly arising upon the record of the case shall be concisely

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1. Notwithstanding the startling and peculiar allusion in the Petition (Appendix, A17) that four of the judges' signatures are "illegible" these signatures are in fact perfectly legible and clear and are those of Judges Erickstad, Teigen, Paulson and Knudson.

> stated in writing, signed by the judges concurring, filed in the office of the clerk of the supreme court and preserved with a record of the case. Any judge dissenting therefrom may give the reason for his dissent in writing over his signature."
>
> "Section 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case."

The provisions of Section 101 requiring consideration and decision of ". . . every point fairly arising upon the record of the case . . ." has been held to mean every point the decision of which is necessary to the final determination of the cause. *Heald* v. *Strong*, 138 N.W. 1114 (N.D. 1912). A review of the opinion in the instant case, officially reported at 217 N.W.2d 455 (N.D. 1974), confirms compliance with each and every mandate of these North Dakota Constitutional provisions.

The opinion of the North Dakota Supreme Court setting forth the detailed reasoning underlying its decision should be scrutinized by counsel and other interested persons, for it is only by critique of a court's reasoning that judgments can be made regarding the competency of judicial officers and the merits of petitions for rehearing. It is curious, therefore, that petitioner in its questions presented for review does not even so much as allude to the reasoning and holdings of the Supreme Court in reaching its decision.

2. **"Can the substitution of a trial judge to sit as an appellate judge be concealed until the moment of oral argument when it is too late to remove the substitute for prejudice?"**

Petitioner's asserted federal question is specious on its face. The record is absolutely devoid of evidence providing any basis for a claim of prejudice of the substitute district judge. Petitioner does not question that District Judge Heen was a fully qualified district judge within the meaning of Section 100 of the North Dakota Constitution. Surely petitioner understands that it has no right, constitutional or otherwise, to have a case heard on appeal before a particular group of appellate judges. When petitioner's counsel appeared before the North Dakota Supreme Court's panel on June 9, 1972, and presented extensive oral argument, District Judge Heen was a part of that panel of five judges. During that oral argument petitioner's counsel made not the slightest suggestion that the panel was not properly constituted, that any of its members were not duly qualified or that any of its members should be disqualified for prejudice or otherwise. Only after an adverse decision was rendered approximately twenty months later was petitioner, on petition for rehearing, heard to question the qualification and selection of District Judge Heen.

3. **"Can the substitute stall his decision so long that only a reversal of the trial judge's decision will nullify the outrageous delay and conceal the $50,000.00 tax free windfall which the delay alone gave the racketeer controlled defendant?"**

This purported federal question attacking the integrity of the substitute district judge and vilifying the respondent corporation without a shred of supporting evidence

in the record is scandalous and alone provides good cause for this Court to strike petitioner's argument under the provisions of Rule 40(5) of its Rules. Petitioner claims delay in the North Dakota Supreme Court's rendering of its decision. The decision was assigned to the substitute district court judge who aside from his selection to sit on the Supreme Court for this case, had the demanding and continuing duties of a trial judge of a court of general civil and criminal jurisdiction. This case involved numerous issues complex both factually and legally. Respondent's appellate brief alone presented 181 pages of argument on sixteen separate issues. Yet petitioner capriciously indicts the Court below for taking the time necessary to study a lengthy record, examine voluminous exhibits, study extensive briefs and render a decision in a very complex case. The absurdity of petitioner's contention speaks for itself.

4. "Can the failure to select a substitute judge in the manner required by the state constitution be concealed by failing to write an opinion on the point as required by the state constitution?"

Section 100 of the North Dakota Constitution requires that in the event of disqualification of a member of the Supreme Court the ". . . remaining judges of said court shall call one of the district judges to sit with them on the hearing of the case". There is nothing in the record of this case or in the reported decision in this case that provides the slightest support for petitioner's assumption that the Chief Justice, who disqualified himself, selected the substitute district judge. The district judge sat in place of the Chief Justice with the four remaining judges of the Court present in open court when petitioner presented extensive oral arguments. How can petitioner now

seriously urge as a federal question to this Court that the substitute district judge was not called upon by the remaining judges? Petitioner cites nothing in the record or in any other source to support its unfounded conclusory allegation. It is presumed under the law of North Dakota that an official duty has been performed regularly and that a court or judge, acting as such, was acting in the lawful exercise of his lawful jurisdiction. N.D.C.C. §§ 31-11-03 (15), (16); *Snortland* v. *Nelson County,* 123 N.W.2d 288, 291 (N.D. 1963). This presumption is, of course, universal in American law. *E.g., Sewell* v. *Lainson,* 57 N.W.2d 556, 559 (Iowa 1953); *State ex rel. School District No. 56* v. *Schmiesing,* 66 N.W.2d 20, 26 (Minn. 1954); *Martin* v. *Smith,* 1 N.W.2d 163, 169 (Wis. 1941). This Court has pointed out many times that in the absence of clear evidence to the contrary, courts will presume that official duties have been properly and lawfully discharged. *E.g., Perkins* v. *Matthews,* 400 U.S. 379, 394 (1971); *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926).

Further, in construing Section 101 of the North Dakota Constitution, the provision requiring the Court to write an opinion on every question fairly arising on the record, the North Dakota Supreme Court has held that this encompasses only questions necessary to a determination of the issues before it. *Inches* v. *Butcher,* 104 N.W.2d 556 (N.D. 1960). Clearly, the appointment of a substitute district judge was neither a necessary nor a relevant issue in this case and did not arise upon the record.

5. "Can the trial judge selected as appellate substitute examine the cold record and make diametrically opposed findings of fact after the legislature had specifically revoked the appellate court's right to grant a trial de novo?"

Petitioner misconceives the scope of judicial review of findings of trial courts. This case was presented to the trial court without a jury. At the time of review of this case on appeal the North Dakota Supreme Court was bound by amended Rule 52(a) of the North Dakota Rules of Civil Procedure, which became effective August 1, 1971. North Dakota adopted Rule 52(a) at that time verbatim from the Federal Rules of Civil Procedure. Under the provisions of Rule 52(a) a trial court's finding of fact may be set aside when "clearly erroneous". This Court had occasion early in the history of the Federal Rules of Civil Procedure, to comment on the scope of judicial review within the meaning of Rule 52(a):

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

> that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

That it was precisely this standard of review that was applied by the North Dakota Supreme Court in rendering its decision is made abundantly clear by examination of that part of the opinion appearing at pp. A15-A16 of the Petition for Writ of Certiorari. (217 N.W.2d at 462-63).

6. "Where all judges are elected, can a judge from a foreign district be imposed on the local district without violating the elective franchise?"

Petitioner asserts the violation of its elective franchise by the substitution of a district court judge to sit in the place of a disqualified Supreme Court Judge. The argument is specious on its face.

> "'Elective franchise' is the right or privilege of a qualified elector or voter to cast his ballot freely in favor of the man of his choice, in an election authorized by law to be held." *Xippas* v. *Commonwealth*, 126 S.E. 207, 209 (Va. 1925).

The petitioner is a business corporation. It has, therefore, no elective franchise, either under constitution or statute, which can be violated or infringed.

Petitioner charges that a judge from a "foreign district" was imposed on the "local district". This was not a case where a district judge tried the case outside his own district. Any judgment can be appealed to the Supreme Court in North Dakota. Section 100 of the Constitution of North Dakota has provided since 1889 that a district judge shall be called to sit as a Supreme Court Judge in place of one of the judges who is himself interested in the cause. In such an instance, of which this case

was one, any district judge is qualified; he is not a "foreign judge" and he is not being "imposed on the local district." No district judge, or judicial district is "foreign" to the Supreme Court.[2] No federal constitutional question is remotely involved.

7. "Are the constitutional standards met when the methods of review are concealed, no rules of review exist except a sort of gentlemen's agreement amongst the judges that if a trial judge takes his time to do their appellate duties, the least they can do is go along with him?"

Respondent confirms that there exist no formal written "rules of review" governing the decision-making process of the North Dakota Supreme Court. The observation might also be made that no appellate court known has promulgated or is governed by so-called "rules of review". As in any other appellate court, the North Dakota Supreme Court and the litigants before it are bound by applicable procedural rules, statutes and constitutional provisions. Quite obviously that includes the North Dakota Rules of Civil Procedure and the Rules of Appellate Procedure for the Supreme Court of North Dakota. However, once a case is fully submitted to the Supreme Court it is absurd to suggest that the court's deliberations should be made subject to "rules of review" and open to public scrutiny. The critical necessity of uncompromised confidentiality and free exchange of thoughts and arguments among deliberating judges, not subject to outside influence, criticism or partisan pressure, and not impeded

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2. It is possible, in fact, that all the regular judges of the Supreme Court may be disqualified in a particular case, so that the ultimate panel will consist of five district judges, sitting as judges of the Supreme Court for that case. *In re Murray*, 145 N.W.2d 899 (N.D. 1966).

by formalistic rules, is at the very heart of the Anglo-American judicial system.

Petitioner's reasoning carried to its logical end would open the deliberations of a petit jury to the public scrutiny and regulate those deliberations by application of "rules of review" or rules of decision. The concept is abhorrent to our jurisprudential system and as "destructive of judicial responsibility" as this Court found the examination of the decision-making process of the Secretary of Agriculture in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (opinion by Frankfurter, J.). The confidentiality of such deliberations has been a fundamental principle for centuries. In *Coward* v. *Porter*, 94 Eng. Rep. 1106 (K.B. 1734), the English court pointed out that "very mischievous consequences" would attend the allowance of testimony by jurors as to their intentions in deliberation and decision-making.

Finally, the clear inference or assumption in petitioner's statement of a purported federal question that four judges of the North Dakota Supreme Court abdicated their judicial duties, did not examine the entire record, and concurred in the substitute district judge's opinion solely in deference to his willingness to write the opinion, represents a serious and unfounded attack upon the integrity of those judges. Such an attack when not founded upon one scintilla of evidence in the record constitutes a scandalous charge casting serious doubts upon the motives of petitioner's counsel.

8. **"The constitutional right to a trial was met and a half million dollar judgment granted, which is a property right. Can the right to a trial and the property right be taken away by the appellate method used here which has so far departed from the accepted and usual course of judicial proceedings as to constitute a denial of due process, equal application of the law, and the elective franchise?"**

In North Dakota appeal from any district court judgment to the Supreme Court is a matter of right. Thus, a judgment of a district court in the State of North Dakota does actually not become final until the time for appeal to the State Supreme Court has expired or the Supreme Court has acted on review and the time for petitioning for rehearing from the Court's decision has expired. It is axiomatic, then, that a district court judgment cannot create a vested property right but rather creates a contingent right subject to review by the North Dakota Supreme Court and under limited circumstances review by this Court.

Petitioner's remaining assertions attacking the "appellate method" are too vague to permit intelligent response. Presumptively petitioner refers to those matters raised in the previous seven questions presented for review. Petitioner is unable to point to the record and identify in a single respect how this case was reviewed on appeal in a manner other than in the "accepted and usual course of judicial proceedings".

PETITIONER'S AUTHORITIES

Petitioner cites but two cases in its petition, *State* v. *Meisinger*, 103 N.W.2d 864 (Minn. 1960) on page 11 and *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937)

on page 16. Neither of these cases has any relevancy to this case, either as to law or facts.

On page 16 of the petition, petitioner gratuitously quotes a sentence from 16 Am.Jur.2d §382 (1964), "a cause shall not be heard before a prejudiced court." We fully agree with that abstraction—but it did not happen here. This is but another baseless innuendo by the petitioner, with which the petition is replete.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below by the Supreme Court of North Dakota did not involve any question of federal law.

Respectfully submitted,

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